

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ARTHUR CAIRNS and DEPARTMENT OF THE NAVY,  
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

*Docket No. 97-2023; Submitted on the Record;  
Issued May 10, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant's disability causally related to his August 19, 1986 employment injury ended by March 31, 1996.

The Office of Workers' Compensation Programs accepted that appellant sustained strained muscles of the lower abdomen and an acute lumbar spine strain and sprain by lifting pipes on August 19, 1986, while working as a welder. Appellant received continuation of pay from August 20 to October 3, 1986 and the Office paid him compensation for temporary total disability from October 4, 1986 until he returned to light duty on January 13, 1987. The Office again paid such compensation from August 11, 1987, when appellant was hospitalized and again stopped work, until he returned to work on August 22, 1988 as an unallocated cost clerk. He was separated by the employing establishment effective April 11, 1995 on the basis that he was unable to perform the duties of a welder.

Appellant filed a claim for a recurrence of disability related to his August 19, 1986 employment injury and the Office resumed payment of compensation for temporary total disability on April 12, 1995. By decision dated March 13, 1996, the Office terminated appellant's compensation effective March 31, 1996 on the basis that the weight of the medical evidence established that appellant's disability related to his August 19, 1986 employment injury ended by that date. Following a hearing held at appellant's request on October 22, 1996, an Office hearing representative affirmed the Office's March 13, 1996 decision by a decision dated December 2, 1996.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>1</sup>

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<sup>1</sup> *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

The Board finds that there is a conflict of medical opinion in this case, of the type envisioned by section 8123(a) of the Federal Employees' Compensation Act.<sup>2</sup>

In a report dated August 11, 1995, Dr. Leonard Klinghoffer, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion, set forth appellant's history, complaints and findings on examination. After reviewing the medical records, Dr. Klinghoffer concluded:

"The cause of this man's complaints is not clear. It sounds from his history as if he sprained his low back as a result of a work-related incident in 1986 and continued to have back pain for reasons that are not defined. Although the records do not mention any neurologic deficit in the lower extremities or any lower extremity complaints, there was evidently some suspicion of a disc herniation but a CAT [computerized axial tomography] scan, a myelogram and another CAT scan after the myelogram were all reported as showing no evidence of such. He now continues to complain of some constant low back symptoms sometimes extending to the medial surface of the right thigh, but his examination does not reveal any physical abnormality that would explain those symptoms although he does have an absent right ankle reflex. That finding suggests the possibility of a lumbar disc herniation at some time in the past, but a herniation causing that finding would produce pain below the knee down to the foot and not medial thigh pain. Moreover, there is no sign of any active nerve root irritation at this time. His x-rays do not reveal any bony pathology that might explain the perpetuation of back symptoms for nine years.

"Were it not for the absent right ankle reflex, I would consider this man as recovered from the 1986 incident, however, considering that finding, I suspect that he may have developed a disc herniation subsequent to the date of the myelogram and has recovered up to a point but still has some lingering complaints. Considering the documentation of continuing symptoms ever since his work-related incident in 1986, I believe that a causal relationship must be recognized between that incident and his continuing back problem. Since such a long time has elapsed and since his physical findings are all normal except for the absent reflex, I do not believe that he needs any treatment now and I believe that he has reached his point of maximum functional recovery.

"I believe that his physical capabilities depend to some degree upon the findings in a current MRI [magnetic resonance imaging scan]. I would therefore like to withhold my comments about his work capacity until I can see his recent MRI, and so soon as that study can be forwarded to me, I will submit an addendum note together with a completed work-capacity evaluation form."

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<sup>2</sup> 5 U.S.C. § 8123(a) states in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

After the Office sent Dr. Klinghoffer copies of the report of an MRI done on August 24, 1995 and an electromyogram (EMG) done on August 4, 1995, Dr. Klinghoffer submitted a report dated October 9, 1995, in which he reviewed the findings on the MRI and concluded:

“There is nothing in the above-described lumbar MRI that would explain the absent right ankle reflex that I noted. The report said that there was no definite evidence of a disc herniation at any level in the lumbar spine. Moreover, the EMG was described as revealing normal findings in the lower extremities. That being the case, I believe that this man has recovered from the 1986 incident. I do not believe that he has any physical limitations related to anything that happened in August of 1986.”

The reports of appellant’s attending physicians support continuing disability causally related to appellant’s August 19, 1986 employment injury. In a report dated March 28, 1995, Dr. Donald A. Baseman, a Board-certified internist who has treated appellant since 1986, stated, “[Appellant] previously worked as a welder at the shipyard, and due to the severity of his injuries, especially to his lumbar spine, [appellant] is absolutely unable to perform his duties.” In a report dated August 1, 1995, Dr. John J. McPhilemy, Jr., an osteopath who specializes in orthopedic surgery and who has treated appellant since April, 1987, diagnosed “chronic unresolved cervical and lumbar spine strain and sprain with myofascitis.” In a report of appellant’s work tolerance limitations dated October 30, 1995, Dr. Baseman indicated appellant could lift a maximum of 25 pounds. This would preclude his performance of the duties of a welder, as lifting up to, and occasionally over, 50 pounds is required. In a report dated February 27, 1996, Dr. Baseman reviewed the results of the August 1995 MRI and EMG, and concluded, “[appellant] has significant injuries, resulting in permanent damage in his cervical and lumbar spine, related to his work injury of August 19, 1986. This is substantiated by physical findings, MRI scans and EMG’s. These injuries preclude him from working in anything but a sedentary job and in no way could he perform the work he did in 1986.” In a report dated May 7, 1996, Dr. McPhilemy reviewed the results of the August 1995 MRI and EMG, and concluded:

“Currently the patient complains of neck pain that radiates into the right upper extremity, as well as low back pain with intermittent radiation into the right buttock area. [Appellant] continues to be disabled from his job as a welder. He is currently capable of sedentary or a light[-]duty work. [Appellant] will not be able to return to his former work as a welder. This is defined as heavy or very heavy type of labor and he is simply not capable of this.

“I believe that [Appellant’s] present and ongoing complaints of neck pain which radiates into the right upper extremity and low back pain that radiates into the lower extremities, are directly and causally related to his work injury of [August 19, 1986]. As a result of these injuries, he is disabled for his former occupation as a welder.”

In terminating appellant’s compensation, the Office found that Dr. Klinghoffer’s reports constituted the weight of the medical evidence. His reports, however, are contradictory on the question of causal relation. In his August 11, 1995 report, Dr. Klinghoffer supported causal relation by stating, “Considering the documentation of continuing symptoms ever since his work-related incident in 1986, I believe that a causal relationship must be recognized between

that incident and his continuing back problem.” In his October 9, 1995 report, Dr. Klinghoffer concluded, based on his review of an August 1995 MRI and EMG that appellant had recovered from his August 1986 injury. Drs. Baseman and McPhilemy supported a continuing causal relationship, with Dr. McPhilemy stating in an August 1, 1995 report that appellant’s lumbar sprain and strain, the condition accepted by the Office, was unresolved. Drs. Baseman and McPhilemy also concluded, in reports dated before and after the Office’s termination of appellant’s compensation, that he could not perform the duties of a welder, the position he held when injured.<sup>3</sup> Dr. Klinghoffer concluded that appellant had no physical limitations for work. The reports of appellant’s attending physicians conflict with the report of the Office’s referral physician on both causal relation and on disability. The Office therefore has not met its burden of proof to terminate appellant’s compensation.

The decisions of the Office of Workers’ Compensation Programs dated December 2 and March 13, 1996 are reversed.

Dated, Washington, D.C.  
May 10, 1999

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>3</sup> While the reports of appellant’s attending physicians take into account a cervical spine condition not accepted by the Office, these reports indicate that appellant’s continuing disability is at least in part due to his lumbar spine condition.